

MEMORANDUM OF LAW

DATE: July 31, 1995

TO: Carolyn Y. Smith, President
Southeastern Economic Development Corporation

FROM: City Attorney

SUBJECT: Redevelopment Agency Ownership and Maintenance of
Residential Common Areas

This is in response to your letter of June 28, 1995, requesting a legal opinion on ownership of common areas.

QUESTION

Can the Redevelopment Agency (the "Agency") of The City of San Diego (the "City") indefinitely own and maintain common areas within a proposed sixty (60) unit single-family development?

ANSWER

The indefinite ownership of property is not an appropriate redevelopment agency function. Many provisions in the law, as well as leading redevelopment authorities, indicate that, except in limited circumstances, agencies must eventually dispose of property they acquire. There are no provisions for an agency to indefinitely own and maintain property. Further, indefinite ownership and maintenance of common areas within a development would present serious liability issues for the City and the Agency.

BACKGROUND

In December, 1994, the Southeastern Economic Development Corporation ("SEDC") entered into an Exclusive Negotiating Agreement with Lincoln Park Associates, the developer of a proposed project consisting of sixty (60) single-family detached homes located within the Central Imperial Redevelopment Project Area. Of these sixty (60) units, approximately twelve (12) are intended for low and moderate income families. The specific common areas in question in this memorandum are a "tot lot" and a "mini-park."

ANALYSIS

The authority under which redevelopment agencies are created and operate is found in the California Community Redevelopment Law (the "Law"), located in the Health and Safety Code section 33000 et seq. All references in this analysis to code sections refer to the California

Health and Safety Code.

Section 33020(a) states:

"Redevelopment" means the planning, development, replanning, redesign, clearance, reconstruction, or rehabilitation, or any combination of these, of all or part of a survey area, and the provision of those residential, commercial, industrial, public, or other structures or spaces as may be appropriate or necessary in the interest of the general welfare, including recreational and other facilities incidental or appurtenant to them

A. Ownership

Although the above section defines redevelopment in fairly broad terms, the ability of an agency to own and maintain property indefinitely is much more restrictive. In fact, a number of sections make it clear that the intent of the Law is for redevelopment agencies to quickly dispose of property it acquires, rather than retain it indefinitely.

Section 33432 provides, "Except as provided in Article 9 (commencing with Section 33410) of this part, an agency shall lease or sell all real property acquired by it in any project area, except property conveyed by it to the community or any other public body." (Article 9, referenced in this section, deals with relocation of people displaced by the project.) Analogous to this section is Section 33402 which prohibits an agency from owning or operating rental property beyond the reasonable time necessary to sell it. Another section further indicates that long term ownership of property is not a proper redevelopment agency function. (Section 33443.) That section provides that when property is acquired for rehabilitation and resale, it must be put up for sale within a year after it is rehabilitated. If it is not sold, the agency must publish a report in a local newspaper, listing the property and stating the reasons why it has not been sold, and describing the plan for its disposition. All of these sections make it clear that the purpose of a redevelopment agency is to effectuate redevelopment, and dispose of the property as soon thereafter as possible, not to own and maintain it after it has been redeveloped.

B. Maintenance

Even if there were not these strong provisions against owning the property, the question would remain: Is there authority for the Agency to maintain the property? The short answer is no. A leading redevelopment treatise recognizes this reality and states, "A redevelopment agency is not authorized to pay for the normal maintenance or operations of buildings, facilities, structures, or other

improvements that are publicly owned." (David F. Beatty et al., *Redevelopment in California*, 1995 [Second Edition 176 (Solano Press Books 1994).])

A possible exception to this general rule might be found in the requirement in the Law to provide low and moderate income housing. Section 33334.2 requires that 20% of the agency's tax increment be used for the purpose of "increasing, improving . . . the community's supply of low- and moderate-income housing available at affordable housing cost." Further, Section 33334.2(e)(2) provides that:

In carrying out the purposes of this section, the agency may exercise any or all of its powers, including the following:

. . . .

(2) Improve real property or building sites with onsite or offsite improvements, but only if either (A) the improvements are made as part of a program which results in the new construction or rehabilitation of affordable housing units for low- or moderate-income persons that are directly benefited by the improvements or (B) the agency finds that the improvements are necessary to eliminate a specific condition that jeopardizes the health or safety of existing low- or moderate-income residents.

While the latitude allowed in these sections arguably could encompass ongoing maintenance as a subsidy to make the units available to low and moderate income families, that option does not seem to fit the facts of this situation. Section 33334.2(e)(2) requires that the maintenance be part of a program that results in new construction, or renovation of such housing. Here, the housing will already have been built before the Agency is called upon to maintain the common areas. Further, with only twelve (12) of the proposed sixty (60) units allocated to low and moderate income families, the connection between maintenance of the entire development's common areas, and providing housing opportunities for low and moderate income families would be tenuous at best.

Since the Law does not seem to provide authority for the Agency to expend monies for ongoing maintenance of the common areas of the Lincoln Park development, any expenditure could be viewed as a gift of public funds, prohibited by both the California Constitution and the San Diego City Charter. (Cal. Const. art. XVI, Section 6; San Diego City Charter Section 93.) The defining line for when an expenditure becomes a gift of public funds was set forth many years ago by the California Supreme Court in *City of Oakland v. Garrison*, 194 Cal. 2d. 298 (1924). In that

case, the Court stressed that an expenditure becomes such a gift when the money is used for a private rather than a public purpose. Id. at 302. In this case, since all the money will be used to maintain the common areas of a private development where 80% of the units are not intended for low and moderate income families, a strong argument could be made that there is no public purpose. As such, the expenditure may be illegal.

C. Liability

Finally, even if the Agency was permitted to own property indefinitely, and there was a provision which allowed the Agency to pay for maintenance, and there was no gift of public funds, there would still be the problem of liability. Since the question asked of this office was simply the legality of owning and maintaining the property, this Memorandum has analyzed only those issues. Nevertheless, if the Agency were to own and maintain this "tot lot," it is reasonably foreseeable that children are going to be injured while playing in the lot. The City and the Agency would be subject to claims and potential liability for any injuries sustained on the premises.

CONCLUSION

The long term ownership of property by a redevelopment agency does not appear to be contemplated in the Law. Even if indefinite ownership were allowed, there are no provisions in the Law that would allow for the expense of ongoing maintenance when applied to the facts of this development. Finally, ownership and maintenance of the project's common areas would raise serious liability issues. For these reasons, it is our advice that the Agency not operate as owner and manager of the Lincoln Park common areas.

If you have any questions, or require additional information, please do not hesitate to call.

JOHN W. WITT, City Attorney

By

Douglas K. Humphreys

Deputy City Attorney

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